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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. JOE RODRIGUEZ, Defendant and Appellant.	B265581 (Los Angeles County Super. Ct. No. BA405944)

APPEAL from a judgment of the Superior Court for the County of Los Angeles. Katherine Mader, Judge. Affirmed as modified.

Edward H. Schulman, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Corey J. Robins, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Joe Rodriguez of first degree murder, and of two counts of deliberate, premeditated, and willful attempted murder (Pen. Code, § 187, subd. (a); count 1, §§ 664, subd. (a), 187, subd. (a); counts 2 & 3). The jury also found true gang and firearm allegations (§§ 186.22, subd. (b)(1)(A), 12022.53, subd. (d) and (e)(1)). Defendant admitted one prior strike conviction, and the court sentenced him to a total term of 130 years to life in prison, consisting of 25 years to life for count 1, doubled due to his strike prior, plus 25 years for the firearm and gang enhancements. He also received two consecutive 25-year-to-life terms for counts 2 and 3. Additionally, he received one 5-year enhancement under section 667, subdivision (a) for count 3.

On appeal, defendant contends there was instructional error as to all counts. Defendant also contends his admission of his prior strike conviction must be set aside because the record does not show the admission was voluntary and intelligent under the totality of the circumstances. He also contends he was improperly sentenced for a prior conviction enhancement that was not alleged, and that the "Super-weapon Enhancement" under Penal Code section 12022.53, subdivision (d) violates California's multiple conviction rule and double jeopardy. We find no merit in any of these contentions and affirm the judgment. We do, however, conclude that the prior serious felony enhancement under section 667, subdivision (a) should have been imposed for each count, and that errors in the abstract of judgment must be corrected.

FACTS

1. The Shooting

On August 26, 2012, at around 4:00 a.m., R.S., L.G., Juan Archila, and K.P. were socializing in front of the apartment building located at the 2000 block of San Marino Street in Los Angeles. The neighborhood was "known for . . . gang activity." Specifically, the apartment building was in Mara Salvatrucha (MS) gang territory. However, R.S., L.G., Juan Archila, and K.P. were not involved in MS. One of MS's rivals was the 18th Street gang, whose territory was adjacent to the shooting.

Juan Archila and L.G. were sitting on the stairs in front of the apartment building, and R.S. and K.P. were standing next to them when two men approached the group on foot. The first man had a black revolver in his hand. He was about a building away from the group when he started firing at them. He fired approximately seven rounds. L.G., K.P., and Juan Archila were struck by bullets. Juan Archila collapsed on top of L.G., and was struggling to breathe. Juan Archila died from his injuries.

V.M. was sitting in her car, across the street from the apartment building, waiting for Juan Archila. She saw two men "r[u]n up on" the group. She saw one of the two men shooting multiple times, striking L.G. twice in the back, and Juan Archila two times in the chest. As the shooter was firing at Juan Archila, K.P. protested, "No man. Don't do that. Don't." The shooter then turned to K.P. and shot him.

G.H. lived two houses down from the apartment building where the shooting occurred. In the early morning hours of August 26, 2012, he was socializing with friends when he heard multiple gunshots. He ran outside and saw two men running west on San Marino. One of the men was wearing black gloves and had a gun in his hand.

2. Evidence of Defendant's Involvement

Also at around 4:00 a.m. on August 26, 2012, Los Angeles Police Officer Karla Godoy and her partner were parked facing northbound on Bonnie Brae Street, between 12th Place and 12th Street, when Officer Godoy noticed two cars traveling eastbound on 12th Street at a high rate of speed. They were driving bumper to bumper, and appeared to be traveling together. Officer Godoy followed the vehicles onto 12th Street.

The lead car was white with four male occupants. The second car was a Dodge Neon with a single occupant. As Officer Godoy was following, the vehicles split up. The Neon continued on 12th Street and the white vehicle turned onto Bonnie Brae, heading towards 11th Street. Officer Godoy followed the white car with multiple occupants, believing that the Neon was a decoy. The white car continued to speed down 11th Street, turning onto Union. She was unable to catch up with the white car.

However, Officer Godoy relocated the Neon, and followed that car. She ran the vehicle's license plate number and discovered that it was registered to defendant's

address in the name of defendant's father, J.R. She then recognized the driver to be defendant, with whom she had several prior contacts on the streets and at his residence. She knew defendant to be an associate of the 18th Street gang. She had never seen him driving before.

Officer Godoy did not initiate a traffic stop. Based on the drivers' conduct, she believed they had either just committed a crime or were on their way to commit a crime. She knew where defendant lived, and therefore was not concerned about pulling him over at that time. Defendant got on the southbound 110 Freeway, and Officer Godoy stopped following him.

Officer Godoy received a radio call that there had been a shooting at the 2000 block of San Marino. Thirty minutes later, she received another radio broadcast that there had been a homicide at that location. Because the shooting occurred in MS territory, and she had seen the suspect vehicles in 18th Street territory, Officer Godoy thought they might be related, because gang members often use decoy cars during crimes. She responded to the scene and told detectives what she had seen.

3. The Investigation

When officers first responded to the scene of the shooting, K.P. and L.G. were still there, wounded. Juan Archila, who had been shot in the chest, was barely breathing and was semi-conscious. Responding officers called for paramedics. The shooters were described as two male Hispanics. They were last seen traveling eastbound on San Marino.

Los Angeles Police Detectives Jose Robledo and Dave Vinton were assigned to investigate the shooting. Detective Vinton obtained security footage from two locations near the shooting that captured the cars described by Officer Godoy circling a couple of times before the shooting. The cars then parked, and later fled the scene in a manner consistent with Officer Godoy's account. The videos also depicted two people running on San Marino. The videos were played for the jury.

4. Defendant's Arrest

Defendant was arrested the day after the shooting, and the Neon was impounded. Two sets of black cotton gloves were found in the vehicle. Defendant was also in possession of keys to the Neon at the time of his arrest.

Defendant was interviewed by Detective Vinton, and a video of the interview was played for the jury. Defendant denied any affiliation with the 18th Street gang. He also denied having a working mobile phone, claiming it was broken. He admitted to having friends in the gang because he grew up in the neighborhood. Defendant admitted that he knew Officer Godoy.

When asked where he was the night of the incident, defendant said he was home with his parents. He also went to a party in South Central which ended at 1:00 a.m. He brought a girl named Antonia back to his house. They had sex, and then he dropped her off at her house. He stayed at her house for awhile and then returned home at 8:00 a.m. He was driving his father's car.

Detective Vinton told defendant that his father's car was seen on San Marino, and he was identified "circling the block when some sh-- went down . . . ." Defendant said he did not know anything, and said that he had "nothing to say." When Detective Vinton told defendant that there was a murder, defendant continued to deny any involvement. He became so agitated he had to be handcuffed.

5. Defendant's Jailhouse Calls

After the interview was concluded, defendant was placed in a holding cell where he could make telephone calls. The calls were recorded and were played for the jury.

In his first call to his father, defendant immediately asked "what's up with Bobby." Defendant's father told defendant that Bobby was with "Pichon" and gave defendant Pichon's phone number.

In another call to his father, the two discussed how defendant came to be in possession of the father's car keys. Defendant's father did not know defendant had a set of keys, and accused defendant of taking them and "hid[ing] that from [him]."

Defendant's father told defendant that he had told police that defendant did not have a set of keys, or a driver's license, and that he never allowed defendant to drive his car.

In another call between defendant and his father, defendant's father asked if defendant had his cell phone. The father told defendant that he told police it fell in the water and was broken. Defendant instructed his father to retrieve a piece of paper out of his dresser that had his cell phone number on it for the "red phone" with "908" in the number. Defendant told father the paper "needs to be thrown out." He instructed his father to "rip it."

In another call to his father, defendant discussed the alibi he had told police. Defendant told his father that he was with "Antonia," attended a party, spent the night with her, and drove her home in the morning. Father asked if defendant spent the night at Antonia's house, and defendant responded, "At your house!" Father responded, "Oh yes, yes, you were right here. You just went to drop her off."

Defendant told his father to get some paper and a pen. Defendant then told father the timeline he had given to police. When father expressed some confusion about the times, defendant exclaimed, "Man, he's already f------ it up." After defendant repeated his alibi, defendant's father was still confused about the timing of events. Defendant responded, "Oh my God. Pa! [¶] . . . Pay attention." When defendant's father again tried to clarify the story, defendant told him to "[s]hut [his] trap." Defendant repeated his alibi, and father indicated he had written it down, and "is that what I should tell him?" Defendant was upset, asking "what kind of question is that?" and telling his father to "[s]hut up." Defendant told his father to tell Antonia not to be afraid, but that the police are "gonna try to threaten her." Father asked if that is what Antonia "needs to say in court."

In a call to "Antonia," defendant went over his alibi. She responded with "Mm-hmm" and "Uh-huh." She was concerned that the police were going to ask her questions, and defendant told her not to be afraid. She said, "I know . . . I don't trip, but . . . what Saturday was this? Or what – what day was this?" Defendant responded, "This . . . Saturday." Defendant told her, "They can't do sh-- to you, fool." She responded,

"[d]on't trip. You know I got you . . . ." Defendant asked her, "Just do me that favor, go to court." She expressed concern that the police would need evidence that she was at his house. She said she did not mind going to court "as long as I don't get busted." Defendant told her the police could not do anything to her.

6. Phone Evidence

In September 2012, Detective Vinton showed witnesses G.H. and V.M. a photographic array. G.H. identified Bobby Rubalcava as the non-shooting perpetrator. V.M. identified Jose Giovanni Lopez as the shooter. Bobby is defendant's nephew.

Police obtained a warrant for Pichon's phone number, which had been given to defendant during one of his jailhouse calls. It was registered to A.O., at the same address where DMV records indicated that Jose Giovanni Lopez resided. Text messages to the phone often referred to "Gio."

Near the time of the murder, a call was placed from Pichon's phone to a telephone with 908 in the number that was registered to 11115 South Burlington. Defendant lived on South Burlington. The 11115 South Burlington address did not exist; police believed the registered address was a typographical error, and that the phone was registered to defendant's address. Moreover, text messages to that phone number were addressed to "Joe." A message from August 23, 2012 at 10:19 p.m. asked whether "you still need some batteries for your baby." Gang expert Daniel Garcia testified that "baby" is slang for a gun and "batteries" is slang for bullets.

7. Physical Evidence

Shell casings and bullet fragments for two different caliber firearms were recovered at the scene. Detective Vinton believed that two different guns were used in the shooting. The location of the shell casings also indicated that there were two gunmen.

A fingerprint belonging to Mainor Viera was found in the Neon. Also, Mainor Viera was a contributor to DNA found on one of the gloves in the car.

8. Gang Evidence

Los Angeles Police Officer Daniel Garcia testified as a gang expert. MS and 18th Street are rival gangs. Defendant lived in 18th Street territory. The crimes were committed in MS territory. Gang members achieve status by committing crimes. Murdering a rival gang member achieves the highest status for a gang member. Gang members sometimes use decoy cars when committing crimes. One car was used to commit the crime, and the other car was used to distract pursuers by splitting up from the other car. The 18th Street gang was known to use this tactic.

Defendant had previously admitted to belonging to the 18th Street gang to police, based on field identification cards from 2010 and 2011. His moniker was "Silent" or "Silencio." Mainor Viera was also known from prior police contacts to be an 18th Street member, as was Jose Giovanni Lopez. Jose Giovanni Lopez had a moniker of Pichon among others. In a 2009 field identification card, Bobby Rubalcava is identified as an 18th Street gang associate.

Officer Lopez opined that defendant was a member of the 18th Street gang Hoover Locos clique. Given a hypothetical tracking the facts of this case, Officer Garcia opined that the crime was committed for the benefit of the gang.

9. Defense Evidence

Mario S. and his sister Nayeli S. testified that defendant and a girl attended Mario's birthday party on August 26, 2012. Defendant arrived around 9:00 p.m. and was there until approximately 5:00 a.m.

Crystal P. testified that Officer Godoy stopped her for a traffic violation, and told Crystal that "she was going to make sure that [defendant] was going to do life . . . ."

DISCUSSION

Defendant makes numerous claims of error on appeal. He contends there was instructional error for the murder count and for the attempted murder counts. Defendant also contends his admission of his prior strike conviction must be set aside because the record does not show the admission was voluntary and intelligent under the totality of the circumstances. He also contends he was improperly sentenced for an unalleged prior

conviction, and that the "Super-weapon Enhancement" violates California's multiple conviction rule and double jeopardy. We find no merit in any of these contentions.

1. Instructional Error for the Murder Count

Defendant contends the jury instructions, and the court's responses to two questions asked by the jury, allowed the jury to render true findings of premeditation and deliberation as to the murder count without finding that defendant personally premeditated and deliberated. He also contends that the CALCRIM No. 400 instruction allowed the jury to wrongfully convict defendant of murder, even if it did not find he intended to aid and abet a murder, but some other crime such as assault with a firearm.

a. The relevant instructions

The prosecutor's theory of the case was that defendant and other 18th Street gang members went on a gang mission to commit murders in rival gang territory, and that defendant was not the gunman, but was a decoy driver.

Therefore, the jury was given the general and unmodified aiding and abetting instruction, CALCRIM No. 400, describing liability as a perpetrator and as an aider and abettor.[1] As to the murder count, the jury was instructed with the standard, unmodified CALCRIM No. 401, addressing the elements for liability for aiding and abetting.[2] The

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[1] CALCRIM No. 400 was given as follows: "A person may be guilty of a crime in two ways. One, he or she may have directly committed the crime. I will call that person the perpetrator. Two, he or she may have aided and abetted a perpetrator, who directly committed the crime. [¶] A person is guilty of a crime whether he or she committed it personally or aided and abetted the perpetrator. [¶] Under some specific circumstances, if the evidence establishes aiding and abetting of one crime, a person may also be found guilty of other crimes that occurred during the commission of the first crime."

[2] The given CALCRIM No. 401 instruction provided, in relevant part, that: "To prove that the defendant is guilty of a crime based on aiding and abetting that crime, the People must prove that: [¶] 1. The perpetrator committed the crime; [¶] 2. The defendant knew that the perpetrator intended to commit the crime; [¶] 3. Before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime; [¶] AND [¶] 4. The defendant's words or conduct did in fact aid and abet the perpetrator's commission of the crime. [¶] Someone aids and abets a crime if he or she knows of the perpetrator's unlawful purpose and he or she

jury was also instructed with standard versions of CALCRIM Nos. 520[3] and 521[4] for the murder count, addressing the elements of first and second degree murder with malice

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specifically intends to, and does in fact, aid facilitate, promote, encourage, or instigate the perpetrator's commission of that crime. [¶] If all of these requirements are proved, the defendant does not need to actually have been present when the crime was committed to be guilty as an aider or abettor. [¶] If you conclude that defendant was present at the scene of the crime or failed to prevent the crime, you may consider that fact in determining whether the defendant was an aider or abettor. However, the fact that a person is present at the scene of a crime or fails to prevent a crime does not, by itself, make him an aider and abettor."

3 CALCRIM No. 520 instructed: "To prove that the defendant is guilty of [murder], the People must prove that: [¶] 1. The defendant committed an act that caused the death of another person; [¶] AND [¶] 2. When the defendant acted, he had a state of mind called malice aforethought, [¶] There are two kinds of malice aforethought, express malice and implied malice. [¶] Proof of either is sufficient to establish the state of mind required for murder. [¶] The defendant acted with express malice if he unlawfully intended to kill. [¶] The defendant acted with implied malice if: [¶] 1. He intentionally committed an act; [¶] 2. The natural and probable consequences of the act were dangerous to human life; [¶] 3. At the time he acted, he knew his act was dangerous to human life; [¶] AND [¶] 4. He deliberately acted with conscious disregard for human life. [¶] Malice aforethought does not require hatred or ill will toward the victim. It is a mental state that must be formed before the act that causes death is committed. It does not require deliberation or the passage of any particular period of time. [¶] An act causes death if the death is the direct, natural, and probable consequence of the act and the death would not have happened without the act. A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence."

4 CALCRIM No. 521 was given as follows: "The defendant is guilty of first degree murder if the People have proved he acted willfully, deliberately, and with premeditation. The defendant acted willfully if he intended to kill. The defendant acted deliberately if he carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill. The defendant acted with premeditation if he decided to kill before completing the acts that caused death. [¶] The length of time the person spends considering whether to kill does not alone determine whether the killing is deliberate and premeditated. The amount of time required for deliberation and premeditation may vary from person to person and according to the circumstances. A decision to kill made rashly, impulsively, or without careful consideration is not

aforethought, and first degree murder based on the theory of deliberation and premeditation. Also, as to the attempted murder counts, a modified version of CALCRIM No. 601[5] was given to the jury, addressing whether the attempted murders were committed with deliberation and premeditation. The instruction provided, in relevant part, that "[t]he attempted murder was done willfully and with deliberation and premeditation if either the defendant or principal or both of them acted with that state of mind. *To convict a defendant of aiding and abetting an attempted murder, a jury must find that he shared the perpetrator's specific intent to kill*." The italicized portion of the instruction was handwritten by the court.

b. The jury's questions

During deliberations, the jury submitted a question to the court, asking for "clarification for the threshold of guilt of aiding and abetting equating to the full charge of murder. The specific clause was handwritten in the jury instructions for counts 2 and 3, but not for count 1." The court responded in open court as follows: "[T]hat is because attempted murder has a different mental state requirement than aiding and abetting to a murder. [¶] And so I wrote in as an instruction the elements of aiding and abetting murder are included in instruction 401 and don't require further elaboration as opposed to counts 2 and 3."

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deliberate and premeditated. On the other hand, a cold, calculated decision to kill can be reached quickly. The test is the extent of the reflection, not the length in time."

[5] As is relevant here, the jury was instructed with CALCRIM No. 601: "If you find the defendant guilty of attempted murder under Count 2 + 3, you must then decide whether the People have proved the additional allegation that the attempted murder was done willfully, and with deliberation and premeditation. [¶] The defendant acted willfully if he intended to kill when he acted. The defendant deliberated if he carefully weighed the considerations for and against his choice, and knowing the consequences, decided to kill. The defendant premeditated if he decided to kill before acting. [¶] The attempted murder was done willfully and with deliberation and premeditation if either the defendant or principal or both of them acted with that state of mind. *To convict a defendant of aiding and abetting an attempted murder, a jury must find that he shared the perpetrator's specific intent to kill*."

Later during their deliberations, the jury submitted another question, asking for "Clarification regarding aiding and abetting. States 'People must prove that 1. the perpetrator committed the crime;' [¶] What is proof? Is it knowledge that a shooting occurred? Is it more substantial like, a conviction of the perpetrator for the crime?" In its written response to the question, the court indicated that: "The jury is referred to the top of Instruction 401 that includes numbers 1 through 4. Each one of the numbered sections must be proved beyond a reasonable doubt. The jury is also referred to Instruction 373 regarding 'other perpetrators.' A conviction as an aider and abettor to a crime does not require that other perpetrators be prosecuted or convicted."

c. Analysis

Initially, respondent contends any claim of error was forfeited because defendant did not object to the instructions or seek any clarification or modification of the instructions. (*People v. Canizalez* (2011) 197 Cal.App.4th 832, 849 [a defendant who believes that an instruction requires clarification must request it].) Defendant acknowledges that his trial counsel did not seek clarification or modification of the instructions, but argues that this court should review the error because his substantial rights are implicated, and because the failure to seek clarification constitutes ineffective assistance of counsel. We find the claimed error was forfeited. However, we will review the claimed error to determine if defendant's substantial rights were affected, and whether counsel rendered ineffective assistance. (*People v. Andersen* (1994) 26 Cal.App.4th 1241, 1249; see also *People v. Mitchell* (2008) 164 Cal.App.4th 442, 467 [to demonstrate ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness, *and* that he was prejudiced by counsel's performance].)

CALCRIM No. 400 provides, in pertinent part, that "[u]nder some specific circumstances, if the evidence establishes aiding and abetting of one crime, a person may also be found guilty of other crimes that occurred during the commission of the first crime." Therefore, defendant argues the jury may have convicted him for murder by

finding that he intended to aid and abet some crime other than murder, such as assault with a firearm.

Defendant's argument strains all credulity. The jury was not instructed on any target crimes other than murder and attempted murder. Instructions are not read in isolation. Instructions must be evaluated as given in whole, and the jury is presumed to follow them. (*People v. Moore* (2011) 51 Cal.4th 1104, 1140; *People v. Sanchez* (2001) 26 Cal.4th 834, 852.) Moreover, the prosecutor's theory of the case was that defendant aided and abetted a murderous attack, not that he intended some other crime. (*People v. Cain* (1995) 10 Cal.4th 1, 37 [an instruction is properly viewed in the context of the prosecutor's closing arguments].)

Defendant also contends that the modified portion of the attempted murder instruction CALCRIM No. 601, which provided that "[t]o convict a defendant of aiding and abetting an attempted murder, a jury must find that he shared the perpetrator's specific intent to kill," coupled with the court's answer to the jury's question about this portion of the instruction (that attempted murder has a different mental state from aiding and abetting murder), necessarily misled the jury as to the prosecution's burden of proof, and allowed the jury to render true findings of premeditation and deliberation for the murder count without necessarily finding that defendant personally premeditated and deliberated.

Here, the given instructions made clear that "[s]omeone aids and abets a crime if he or she knows of the perpetrator's unlawful purpose and he or she specifically intends to, and does in fact, aid facilitate, promote, encourage, or instigate the perpetrator's commission of that crime." (CALCRIM No. 401.) The jury was also correctly instructed on the elements of premeditation and deliberation. There was nothing misleading in the modified attempted murder instruction, and the court's explanation that "attempted murder has a different mental state requirement than aiding and abetting to murder" was not likely to mislead the jury concerning the elements of aiding and abetting a premeditated murder. Nor do the jury's questions suggest that it was in fact misled. The jury simply sought clarification on the elements of the crimes, and the court properly

directed the jury to the legally correct instructions it had already been provided. In light of the entire charge to the jury, we are not persuaded the jury misinterpreted the court's answers to its questions to mean it was not required to find that defendant *personally* harbored the required mental state.

Therefore, because the instructions were correct statements of the law, and were not misleading, we find that any claim of error was forfeited, and the failure to seek clarification does not constitute ineffective assistance of counsel.

Moreover, any error was necessarily harmless. (*Chapman v. California* (1967) 386 U.S. 18, 24.) The prosecutor's theory of the case was that defendant aided and abetted a premeditated and calculated gang murder. The evidence of premeditation was overwhelming. Defendant was seen cruising around the shooting scene in advance of the shooting, and had text message exchanges about whether he had bullets for his gun days in advance of the shooting. One of the witnesses testified he saw two men running west on San Marino, and one of the men was wearing black gloves and had a gun in his hand. Defendant was arrested the day after the shooting, and two sets of black gloves were found in the car he was driving the day of the shooting. His attempt to manufacture an alibi shows his consciousness of guilt. The jury could hardly have concluded that defendant intended to aid and abet premeditated murder without himself premeditating the crime. (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1166 ["It would be virtually impossible for a person to know of another's intent to murder and decide to aid in accomplishing the crime without at least a brief period of deliberation and premeditation, which is all that is required."].)

2. Instructional Error for the Attempted Murder Counts

Defendant next contends that CALCRIM No. 601 removed the "the critical component of individual culpability (mens rea) from the legal calculus . . . ." Specifically, he contends CALCRIM No. 601 did not require the jury to find that he personally premeditated and deliberated the attempted murders.

CALCRIM No. 601 provides in relevant part that: "The attempted murder was done willfully and with deliberation and premeditation if either the defendant or principal or both of them acted with that state of mind."

It is well settled that the prosecution is not required to prove defendant's personal premeditation and deliberation. The crime of attempted murder requires "*only* that the murder attempted must have been willful, deliberate, and premeditated, *not* that the attempted murderer *personally* must have acted willfully and with deliberation and premeditation." (*People v. Lee* (2003) 31 Cal.4th 613, 622 (*Lee*).) Thus, one who aids and abets another in committing attempted murder can be subject to the greater punishment for willful, deliberate, and premeditated attempted murder even though he or she did not personally act with the requisite willfulness, deliberation, and premeditation. (*Id*. at pp. 616, 627; see also *People v. Favor* (2012) 54 Cal.4th 868, 879-880 (*Favor*).)

Defendant contends that *Lee* and *Favor* were wrongly decided, and offend his due process right to have the jury determine the charges against him beyond a reasonable doubt. (See *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [any fact which increases the maximum penalty for a crime is an element of the offense that must be found true by a jury beyond a reasonable doubt].)

Penal Code section 664, subdivision (a) increases the maximum penalty for attempted murder, and has long been subject to the federal constitutional requirement that it must be found true by a jury beyond a reasonable doubt. Nothing in *Lee* or *Favor* suggests that our Supreme Court based its holdings on an incorrect understanding of established federal constitutional law. The *Lee* court expressly recognized that if section 664, subdivision (a) contained a requirement that an aider and abettor *personally* act with premeditation and deliberation, the jury would have to be instructed on that requirement. (*Lee*, *supra*, 31 Cal.4th at p. 616.) Thus, the Supreme Court was clearly aware of the requirement of a jury determination before the penalty provision of section 664, subdivision (a) may be imposed. Therefore, the holdings of *Lee* and *Favor* are dispositive of the issue here. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

3. Improper Advisement for Defendant's Prior Strike Conviction

Defendant also contends that his admission of his prior strike conviction must be set aside because the record does not show the admission was voluntary and intelligent under the totality of the circumstances. Specifically, defendant contends that, while the trial court advised him of his jury trial rights, the trial court failed to advise him of his right to remain silent, his right to confront witnesses, and of the penal consequences of his plea. We disagree.

As the jury was deliberating, the following colloquy ensued:

"THE COURT: If you remember at the very beginning of the trial your attorney wanted to bifurcate or to separate out the issue of whether or not you have a prior strike. And so that's what we did. [¶] And so you have a right to have the jurors come back after they have a verdict. But if they did have a verdict, they would come back and decide whether you really were convicted of this prior offense. [¶] Or you can give up the right to have the jury do it and just have me listen to the evidence of whether or not that prior strike is true and whether it was you that committed it.

"[DEFENSE COUNSEL]: You see what the judge is saying?

"THE COURT: You want to give him advice?"

Defendant and counsel then conferred sotto voce.

"[DEFENSE COUNSEL]: Do you want to have a trial with the jurors? Or do you want to have a trial with the judge? Or want to say, 'Okay. I did that. I have a conviction in the past'? [¶] Do you want to agree to that without going through all of that business? [¶] And you have a conviction; right?

"DEFENDANT: Yeah.

"[DEFENSE COUNSEL]: So it's no skin of[f] our nose, really. [¶] . . . [¶]

"THE COURT: So we're asking whether you would give up your right to have a jury decide whether you have a prior conviction and let the court decide.

"DEFENDANT: I don't think the jury should know about that.

"THE COURT: Well, they're not going to know about it unless you want them to know about it. So if they convict you of anything, if they convict you of anything right

now, they would have to stay here and listen to evidence as to whether or not you were previously convicted of robbery. [¶] So you can decide that you don't want them to have to come back and listen to that. And the court would make a determination in a court trial without the jury whether or not you were convicted of robbery.

"[DEFENSE COUNSEL]: Or you can just say yes, I admit I had that conviction in the past. [¶] You have that conviction. You might as well admit it. It doesn't affect you unless they come back with a verdict of guilty. [¶] Yes?

"DEFENDANT: Yeah, I do admit I have a conviction in the past.

"THE COURT: Okay. . . . [¶] . . . [¶] So the prior conviction is FJ40670. And the conviction date was June 18th, 2008, in Los Angeles Superior Court. [¶] Do you admit that you were convicted of the crime of robbery, 211?

"DEFENDANT: Yes, Your Honor.

"THE COURT: Okay. Thank you. [¶] That's all we need to do."

a. Analysis

"[B]efore accepting a criminal defendant's admission of a prior conviction, the trial court must advise the defendant and obtain waivers of (1) the right to a trial to determine the fact of the prior conviction, (2) the right to remain silent, and (3) the right to confront adverse witnesses. (*In re Yurko* (1974) 10 Cal.3d 857, 863.) Proper advisement and waivers of these rights in the record establish a defendant's voluntary and intelligent admission of the prior conviction." (*People v. Mosby* (2004) 33 Cal.4th 353, 356 (*Mosby*).)

There is a difference between cases where the record is completely silent concerning the advisements received by the defendant, and cases involving incomplete advisements. (*Mosby*, *supra*, 33 Cal.4th at pp. 361-364.) In silent record cases, there is no express advisement and waiver of constitutional rights in the record, and so a reviewing court cannot infer that the defendant knowingly and intelligently waived his rights. (*Id*. at p. 362.) In incomplete advisement cases, a defendant waives his constitutional rights after being advised of his right to trial on the prior conviction allegation, but not of the rights to remain silent and to confront witnesses. (*Id*. at pp. 362-

364.) Reversal is not required when "a defendant admits a prior conviction after being advised of and waiving only the right to trial" but "the totality of circumstances surrounding the admission" supports the conclusion that the admission was voluntary and intelligent. (*Id*. at p. 356.)

Here, defendant was not advised of and did not expressly waive his constitutional rights to confront witnesses and to remain silent. Defendant's incomplete advisement is similar to the one given in *Mosby*. Defendant had just participated in a lengthy trial. Defendant exercised his right not to testify, forcing the prosecution to prove the charges against him. Thus, defendant would have understood that he had the right to remain silent, requiring the prosecution to prove the prior conviction allegations against him. (*Mosby*, *supra*, 33 Cal.4th at p. 364.) Defendant, through counsel, also confronted numerous witnesses at his jury trial, so he also would have understood that at a trial of the prior conviction allegations he would have had the right of confrontation. (*Ibid*.) Thus, the court found defendant was aware of his right to confront witness and to remain silent. (*Id*. at p. 361 ["the reviewing court must examine the record of 'the entire proceeding' to assess whether the defendant's admission of the prior conviction was intelligent and voluntary in light of the totality of circumstances"].) The same is true in this case.

A defendant who admits a prior criminal conviction must also be advised of the increased sentence which might be imposed. (*In re Yurko*, *supra*, 10 Cal.3d at p. 864; *People v. Wrice* (1995) 38 Cal.App.4th 767, 770 (*Wrice*).) However, unlike the advisement of constitutional rights, this requirement is a judicially declared rule of criminal procedure, and not a constitutional mandate. (*In re Yurko*, at p. 864; *Wrice*, at p. 770.) When the only error is a failure to advise of the penal consequences of an admission, the error is waived if it is not raised at or before sentencing. (*Wrice*, at pp. 770-771.)[6]

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6 We requested supplemental briefing from the parties under Government Code section 68081 concerning whether defendant's failure to object on this basis forfeited his appellate challenge. Defendant contends the issue was not forfeited, because it was not the "only" error in the advisements he received. (*Wrice*, *supra*, 38 Cal.App.4th at

Defendant also contends, in a footnote with no analysis, that counsel was ineffective for failing to object, and for advising him to admit his prior conviction. We can discern no prejudice, and defendant has not attempted to show any.

4. Unalleged Prior Conviction Enhancement

Defendant contends that the trial court improperly assessed a five-year enhancement under Penal Code section 667, subdivision (a) to count 3, which was not alleged in the information. Section 667, subdivision (a) imposes a five-year consecutive enhancement for a prior serious felony conviction. Here, the information alleged that "[p]ursuant to Penal Code sections 1170.12(a) through (d) and 667(b) through (i) as to count(s) 1, 2, and 3 that said defendant(s), JOE RODRIGUEZ, has suffered the following prior conviction of a serious or violent felony or juvenile adjudication . . . . [¶] . . . [¶] . . . PC 211."

Generally, where the information puts the defendant on notice that a sentence enhancement will be sought and also notifies him of the facts supporting the alleged enhancement, and where the facts supporting the alleged enhancement would also support a different, unalleged enhancement, a trial court's imposition of sentence under the unalleged enhancement will be upheld unless the defendant has been misled to his prejudice. (*People v. Neal* (1984) 159 Cal.App.3d 69, 73.)

Here, the information put defendant on notice that the prosecution was seeking to enhance his sentence. The facts alleged in the information are sufficient to support a Penal Code section 667, subdivision (a) enhancement. A current conviction for a serious felony and past conviction for a serious felony are all that is required to impose a section 667, subdivision (a) enhancement. Attempted murder is a serious felony, as is a

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pp. 770-771 ["when the only error is a failure to advise of the penal consequences, the error is waived if not raised at or before sentencing"].) We are not persuaded. The *Wrice* court simply acknowledged that errors of a constitutional magnitude are not forfeited, and therefore, the failure to object to improper advisements of constitutional rights would not result in a forfeiture. (*Ibid.*; see also *People v. Cross* (2015) 61 Cal.4th 164, 172-173.) Judicially created rights, such as the advisement of penal consequences, require an objection. (*Wrice*, at pp. 770-771.)

violation of section 211. The jury convicted defendant of attempted murder, and the question of whether defendant's prior robbery conviction qualified as a serious or violent felony is a question of law for the trial court. (*People v. Wiley* (1995) 9 Cal.4th 580, 583, 592.) By admitting that he had suffered the prior conviction for a violation of section 211, defendant admitted the only fact necessary for the imposition of a section 667, subdivision (a) enhancement.

Moreover, we can discern no prejudice. Defendant was fully apprised he was facing enhanced penalties for his prior conviction. It does not appear defendant would have prepared his defense any differently had the Penal Code section 667, subdivision (a) enhancement been alleged. (*People v. Thomas* (1987) 43 Cal.3d 818, 831-832.)

It is well settled that the enhancement under Penal Code section 667, subdivision (a) must be applied to each count for which defendant receives an indeterminate sentence. (*People v. Williams* (2004) 34 Cal.4th 397, 403-404; see also *People v. Sasser* (2015) 61 Cal.4th 1, 12-15.) Therefore, five-year enhancements should also have been applied to counts 1 and 2. An appellate court has jurisdiction to modify and correct a sentencing error as a matter of law, regardless of whether an objection or argument was raised in the trial court or in the reviewing court. (See *People v. Smith* (2001) 24 Cal.4th 849, 852-854; see also *People v. Talibdeen* (2002) 27 Cal.4th 1151, 1157; *People v. Stone* (1999) 75 Cal.App.4th 707, 717.)

5. "Super-weapon Enhancement" Violates California's Multiple Conviction Rule and Double Jeopardy

Lastly, defendant argues that the imposition of the 25-year-to-life enhancement under Penal Code section 12022.53, subdivision (d) on his murder conviction violates California's multiple conviction rule as stated in *People v. Ortega* (1998) 19 Cal.4th 686 and *People v. Pearson* (1986) 42 Cal.3d 351, because an essential element of the section 12022.53, subdivision (d) enhancement (discharge of a firearm causing death) is subsumed within the elements of murder. Defendant also argues that federal double jeopardy principles should apply to multiple punishments within a unitary trial and not only to successive prosecutions.

Defendant concedes, as he must, that two California Supreme Court decisions have rejected his claim under California's multiple conviction rule. (*People v. Sloan* (2007) 42 Cal.4th 110, 115-125; *People v. Izaguirre* (2007) 42 Cal.4th 126, 130-134.) Defendant's argument fails because we are bound by those decisions. (*Auto Equity Sales, Inc. v. Superior Court*, *supra*, 57 Cal.2d at p. 455.)

Defendant also acknowledges that federal double jeopardy principles have not been applied to multiple punishments within a unitary trial, but contends that recent United States Supreme Court decisions suggest that they now should. Again, because there is California Supreme Court and United States Supreme Court authority holding that multiple criminal punishments that arise out of a unitary criminal proceeding do not implicate federal double jeopardy, we must reject defendant's double jeopardy contention. (See *People v. Sloan*, *supra*, 42 Cal.4th at p. 121; see also *Hudson v. United States* (1997) 522 U.S. 93, 99.)

6. Correction to the Abstract of Judgment

Lastly, we note that the abstract of judgment does not properly reflect the imposition of the five-year Penal Code section 667, subdivision (a) enhancement on count 3. Also, as we discussed *ante*, the trial court was required to impose section 667, subdivision (a) enhancements for each count. Therefore, the abstract of judgment is ordered to be corrected.

DISPOSITION

The judgment is affirmed. The superior court is directed to correct the abstract of judgment to reflect the imposition of five-year enhancements under Penal Code section 667, subdivision (a) for counts 1, 2, and 3, and to transmit a copy of the same to the Department of Corrections.

GRIMES, J.

WE CONCUR:

BIGELOW, P. J. FLIER, J.